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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. HECTOR BRAVO, Defendant and Appellant.	B284968 (Los Angeles County Super. Ct. No. BA410426)

APPEAL from an order of the Superior Court for the County of Los Angeles, Drew E. Edwards, Judge. Reversed and remanded with directions.

Adrian K. Panton, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Steven D. Matthews, Lance E. Winters and Christopher Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

Hector Bravo pleaded no contest to second degree burglary of a vehicle in August 2013 and was sentenced to serve 16 months in Los Angeles County Jail. On July 17, 2017 Bravo, representing himself, moved to vacate his conviction pursuant to former Penal Code section 1473.7, subdivision (a)(1),[1] on the ground the conviction was legally invalid due to a prejudicial error damaging his ability to meaningfully understand the adverse immigration consequences of his plea. The superior court denied the motion, finding Bravo did not fall within the class of persons eligible for relief under section 1473.7 because he was "currently incarcerated at the Adelanto Detention Facility of the California Department of Corrections."

On appeal Bravo contends, the Attorney General concedes and we agree the superior court erred in denying relief in the mistaken belief Bravo was in state criminal custody, rather than the custody of the U.S. Immigration and Customs Enforcement (ICE) awaiting deportation. Bravo also contends the superior court committed reversible error per se in failing to appoint counsel to represent him in connection with his motion. The Attorney General argues section 1473.7 does not provide for a right to appointed counsel.

We reverse the order denying Bravo's motion to vacate his conviction and remand the matter with instructions to the

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[1] Statutory references are to this code. References in our opinion to former section 1473.7 are to the text of that statute as enacted effective January 1, 2017 (Stats. 2016, ch. 739, § 1). The statute was amended effective January 1, 2019 (Stats. 2018, ch. 825, § 2).

superior court to evaluate Bravo's request for counsel and to consider the motion on its merits.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Bravo's Plea to Second Degree Burglary*

Bravo was charged on July 5, 2013 with second degree burglary for allegedly entering a truck with locked doors with the intent to commit larceny. According to a probation office postsentence report, the owner of the truck observed Bravo inside the cab portion of the truck. Bravo had apparently climbed into the tailgate and then pried open the rear window of the truck to gain entry.

On August 28, 2013 Bravo, represented by a deputy public defender, pleaded no contest to the charge of second degree burglary and was ordered to serve 16 months in county jail with credit for 258 days in custody. Before Bravo entered his plea, the deputy district attorney advised Bravo on the record that, if he was not a United States citizen, "conviction of this offense will result in you being deported, being denied the right to become a citizen. If you leave the country, denied the right to reenter, and the right to amnesty." Bravo confirmed he understood the advisement. Neither the reporter's transcript nor the minute order from the August 28, 2013 plea hearing indicates Bravo was assisted by an interpreter.

2. *Bravo's Motion To Vacate the Conviction*

On July 17, 2017 Bravo, representing himself, filed a motion to vacate the conviction pursuant to former section 1473.7. In his motion, which had been translated from Spanish to English, Bravo explained he is not a native English speaker, he had difficulty understanding his attorney and the

court in the absence of an interpreter and his attorney had failed to advise him he could request the assistance of one. In addition to the language barrier, Bravo asserted his ability to understand the proceedings was further impaired by medication he was taking at the time, which left him in a general state of confusion. Bravo argued he did not have the effective assistance of counsel in entering his plea and in defending against the burglary charge. Specifically, Bravo claimed his attorney failed to conduct adequate investigation into, perform any research of, or provide proper advice concerning the immigration consequences of his conviction. He contended, although the deputy district attorney may have said in court his conviction would result in his deportation, in reality he did not have any understanding or knowledge of the adverse immigration consequences of his plea.

According to Bravo, at the time of his arrest he was sick and had been trying to lie down in an old battered truck that had been parked on the street for at least several days. He argued he would not have pleaded no contest to second degree burglary had he been aware that doing so would result in his mandatory deportation, particularly because there was little or no evidence he was guilty of burglary, rather than the lesser offense of trespass. In his declaration in support of the motion, Bravo contended the immigration judge had stated, if he could "have a different charge with a lower sentence," he could be released from custody. He also stated he was being detained at the Adelanto Detention Facility in the custody of ICE and had been in "[i]mmigration detention" since December 13, 2013.

Bravo attached as an exhibit to his section 1473.7 motion a document titled "U.S. Department of Homeland Security" "Warrant for Arrest of Alien," dated December 11, 2013. The

arrest warrant commanded Bravo be taken into custody "for proceedings in accordance with the applicable provisions of the immigration laws and regulations" and included a certificate of service showing it had been served on December 13, 2013. Bravo also attached a document titled "Order of the Immigration Judge," dated May 22, 2014, which stated it was a summary of an oral decision entered on May 22, 2014. According to the written summary of the immigration judge's oral decision, Bravo's application for voluntary departure was denied, and Bravo was ordered removed to Mexico. Other documents attached to Bravo's motion confirmed he was being held at the Adelanto Detention Facility of the Department of Homeland Security.

On July 17, 2017, the same date as the filing of his section 1473.7 motion, Bravo filed a waiver of his right to be present at the hearing of any motion or other proceeding in the case, as well as a request for appointment of counsel. Bravo explained he was unable to personally attend any proceedings because he had been placed under indefinite detention in federal immigration custody. Bravo also stated he was unable to afford counsel and requested the court appoint counsel to represent him in all matters related to the section 1473.7 motion.

3. *The Superior Court's Order Denying Bravo's Motion*

On August 3, 2017 the court called the case for consideration of Bravo's motion. None of the parties appeared. Stating former section 1473.7 provides, "[A] person . . . no longer imprisoned or restrained may prosecute a motion to vacate a conviction or sentence," the trial court denied the motion on the ground Bravo was "currently incarcerated at the Adelanto Detention Facility of the California Department of Corrections"

and thus did not "fall within the class of persons who are eligible for relief under California Penal Code Section 1473.7."

DISCUSSION

1. *The Superior Court Erred in Denying Bravo's Section 1473.7 Motion on the Ground Bravo Was in the Custody of the California Department of Corrections and Rehabilitation*

At the time Bravo filed his motion section 1473.7, subdivision (a), provided, "A person no longer imprisoned or restrained may prosecute a motion to vacate a conviction or sentence for either of the following reasons: [¶] (1) The conviction or sentence is legally invalid due to a prejudicial error damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere. [¶] (2) Newly discovered evidence of actual innocence exists that requires vacation of the conviction or sentence as a matter of law or in the interests of justice."

Section 1473.7 has since been amended effective January 1, 2019 to clarify the section's timing and procedural requirements. (Stats. 2018, ch. 825, § 1; see Sen. Com. on Pub. Safety, Rep. on Assem. Bill No. 2867 (2017-2018 Reg. Sess.) June 4, 2018, p. 1.) Amended subdivision (a) replaced the language "[a] person no longer imprisoned or restrained may prosecute a motion" with "[a] person who is no longer in criminal custody may file a motion."[2] (Stats. 2018, ch. 825, § 2.)

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[2] As amended effective January 1, 2019 section 1473.7, subdivision (a), provides, "A person who is no longer in criminal custody may file a motion to vacate a conviction or sentence for either of the following reasons: [¶] (1) The conviction or sentence is legally invalid due to prejudicial error damaging the

As discussed, the superior court denied Bravo's section 1473.7 motion on the ground he was "currently incarcerated at the Adelanto Detention Facility of the California Department of Corrections." However, the Adelanto Detention Facility is in fact a federal facility operated under contract with ICE to house federal immigration detainees.[3] When he filed his motion, Bravo was not in criminal custody for his state court burglary conviction but in the custody of ICE pending deportation. He is, therefore, a "person who is no longer in criminal custody" for purposes of amended section 1473.7.

Bravo is also a "person no longer imprisoned or restrained" for purposes of former section 1473.7. An individual who was convicted of a criminal offense, served time in state prison or a county jail and, upon release, has been taken into custody by ICE pending deportation is "no longer imprisoned or restrained" within the meaning of former section 1473.7, subdivision (a). (*People v. Perez* (2018) 19 Cal.App.5th 818, 826-827.)

As explained in the report of the Senate Committee on Public Safety when considering the bill that became former section 1473.7, the purpose of the legislation was to "fill a gap in

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moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere. A finding of legal invalidity may, but need not, include a finding of ineffective assistance of counsel. [¶] (2) Newly discovered evidence of actual innocence exists that requires vacation of the conviction or sentence as a matter of law or in the interests of justice."

[3] The court may have confused Bravo's place of detention with San Bernardino County's High Desert Detention Center, which is also located in Adelanto.

California criminal procedure" by providing a means to challenge a conviction by a person facing possible deportation who is no longer in criminal custody and thus for whom a petition for a writ of habeas corpus is not available: "California lags far behind the rest of the country in its failure to provide its residents with a means of challenging unlawful convictions after their criminal sentences have been served. . . . [¶] This omission has a particularly devastating impact on California's immigrant community. . . . Many immigrants suffer convictions without having any idea that their criminal record will, at some point in the future, result in mandatory immigration imprisonment and deportation, permanently separating families. [¶] . . . Challenging the unlawful criminal conviction is often the only remedy available to allow immigrants an opportunity to remain with their families in the United States. Yet, in California, affected individuals have no way of challenging their unjust convictions once probation ends, because they no longer satisfy habeas corpus' strict custody requirements." (Sen. Com. on Pub. Safety, Rep. on Assem. Bill No. 813 (2015-2016 Reg. Sess.) June 22, 2015, pp. 4-5.) The Senate report continued, "This bill creates a new mechanism for post-conviction relief for a person who is no longer in actual or constructive custody. Specifically, it allows a person to move to vacate a conviction due to error affecting his or her ability to meaningfully understand, defend against, or knowingly accept the actual or potential immigration consequences of the conviction." (*Id.* at p. 6.)

Whether pursuant to former or amended section 1473.7 Bravo falls within the class of persons who may bring a section 1473.7 motion. The court erred in denying Bravo's motion

based solely on its mistaken belief he was still incarcerated by the state.

2. *The Superior Court Erred in Failing To Consider Bravo's Request for Appointment of Counsel*

Former section 1473.7, subdivision (d), provided, "All motions shall be entitled to a hearing. At the request of the moving party, the court may hold the hearing without the personal presence of the moving party if counsel for the moving party is present and the court finds good cause as to why the moving party cannot be present." Bravo contends, and we agree, as did the Attorney General initially, although this provision does not expressly provide for a right to counsel, if the moving party is indigent and cannot attend the hearing because he or she is in federal custody awaiting deportation, the superior court should appoint counsel. To construe the statute otherwise would create an impossible situation: The court, obligated to hold a hearing on the motion to vacate, could not do so consistently with former subdivision (d)'s requirement that the moving party be personally present or, if not, represented by counsel. (See *John v. Superior Court* (2016) 63 Cal.4th 91, 96 ["[w]e . . . harmonize statutory provisions to avoid absurd results"]; *Gattuso v. Harte-Hanks Shoppers*, *Inc.* (2007) 42 Cal.4th 554, 567 [in construing an ambiguous statutory provision """"[w]e must . . . give the provision a reasonable and commonsense interpretation consistent with the apparent purpose and intention of the lawmakers . . . which upon application will result in wise policy rather than mischief or absurdity""""].)

As explained, however, section 1473.7 was amended effective January 1, 2019. Amended section 1473.7, subdivision (d), now provides, "All motions shall be entitled to a

hearing. Upon the request of the moving party, the court may hold the hearing without the personal presence of the moving party provided that it finds good cause as to why the moving party cannot be present. If the prosecution has no objection to the motion, the court may grant the motion to vacate the conviction or sentence without a hearing."

The Attorney General contends the Legislature, by amending section 1473.7, subdivision (d), to remove the language authorizing the court to hold a hearing without the presence of the moving party if counsel for the moving party is present, intended to clarify the statute and eliminate any implication it provides a right to appointed counsel. The Attorney General further argues that applying a clarifying amendment to conduct predating the amendment does not constitute a retroactive application of the new provision. In support of his argument the Attorney General points to the ambiguous language in former subdivision (d), which does not expressly provide for court-appointed counsel; statements in legislative committee reports that the purpose of the amendment was to provide clarification regarding section 1473.7; and the absence of any comments in the legislative history regarding deletion of the language regarding the presence of the moving party's counsel at the hearing on a section 1473.7 motion, which he suggests indicates the amendment did not effect a material change in that portion of the statute.

The points advanced by the Attorney General undercut his argument, rather than support it. Although former subdivision (d) did not expressly provide for a right to counsel, the most reasonable interpretation of its language, as the Attorney General conceded, contemplated that counsel would be

appointed for indigent parties who were unable to attend the hearing because they were in federal detention awaiting deportation. Under these circumstances, if the Legislature had intended to "clarify" the former enactment by eliminating the right to appointed counsel, surely some comment on that point would appear in the legislative history. None does. Moreover, the Attorney General's argument ignores the Legislative Counsel's Digest summarizing the final version of Assembly Bill No. 2867, which plainly anticipated continuation of the right to counsel implicit in the original version of section 1473.7:

"Existing law authorizes the court, at the request of the moving party, to hold the hearing without the personal presence of the moving party if counsel for the moving party is present and the court finds good cause as to why the moving party cannot be present. [¶] . . . The bill would authorize the court, upon the request of the moving party, to hold the hearing without the personal presence of the moving party and without the moving party's counsel present provided that it finds good cause as to why the moving party cannot be present." (Legis. Counsel's Dig., Assem. Bill No. 2867 (2017-2018 Reg. Sess.).)[4]

We reject the Attorney General's argument for another, fundamentally important reason. "[C]ourts should, if reasonably possible, construe a statute 'in a manner that avoids *any* doubt

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[4] The Legislative Counsel's summaries, which "'are prepared to assist the Legislature in its consideration of pending legislation,'" while "not binding," are nevertheless "entitled to great weight"; "'[i]t is reasonable to presume that the Legislature amended those sections with the intent and meaning expressed in the Legislative Counsel's digest.'" (*Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1169-1170.)

about its [constitutional] validity.'" (*Kleffman v. Vonage Holdings Corp.* (2010) 49 Cal.4th 334, 346.) "'If a statute is susceptible of two constructions, one of which renders it constitutional and the other unconstitutional (or raises serious and doubtful constitutional questions), the court will adopt the construction which will render it free from doubt as to its constitutionality, even if the other construction is equally reasonable.'" (*Field v. Bowen* (2011) 199 Cal.App.4th 346, 355; see *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 394.)

Neither the federal nor the state Constitution mandates an unconditional right to counsel to pursue a collateral attack on a judgment of conviction. (See, e.g., *Pennsylvania v. Finley* (1987) 481 U.S. 551, 556-557 [107 S.Ct. 1990, 95 L.Ed.2d 539] [no federal constitutional or due process right to appointed counsel in state postconviction proceedings]; *People v. Shipman* (1965) 62 Cal.2d 226, 231-232; cf. *In re Barnett* (2003) 31 Cal.4th 466, 474-475 [no federal or state "constitutional right to counsel for seeking collateral relief from a judgment of conviction via state habeas corpus proceedings"].) Nevertheless, "if a postconviction petition by an incarcerated defendant 'attacking the validity of a judgment states a prima facie case leading to issuance of an order to show cause, the appointment of counsel is demanded by due process concerns.'" (*People v. Rouse* (2016) 245 Cal.App.4th 292, 300, quoting *In re Clark* (1993) 5 Cal.4th 750, 780.)

As explained by the Supreme Court in *People v. Shipman, supra,* 62 Cal.2d at page 231, "whenever a state affords a direct or collateral remedy to attack a criminal conviction, it cannot invidiously discriminate between rich and poor." Compliance with the principle that invidious discrimination should be rooted

out as unconstitutional, which does not require "absolute equality to the indigent," may be effected by requiring the appointment of counsel for an indigent petitioner who, in challenging a judgment of conviction, has set forth "adequate factual allegations stating a prima facie case"; otherwise, "there would be no alternative but to require the state to appoint counsel for every prisoner who asserts that there may be some possible ground for challenging his conviction." (*Id*. at p. 232.) We thus construe amended section 1473.7 to provide the right to appointed counsel where an indigent moving party has set forth factual allegations stating a prima facie case for entitlement to relief under the statute; to interpret the statute otherwise would be to raise serious and doubtful questions as to its constitutionality.

Our construction of amended section 1473.7 to provide this conditional right to appointed counsel is fully supported by the Legislature's purpose in enacting this statute. As explained, section 1473.7 was designed to remedy the failure of then-existing California law to provide a means for a person no longer in criminal custody to challenge a conviction due to error affecting his or her ability to meaningfully understand the actual or potential immigration consequences of the conviction. Specifically, a person in the custody of federal immigration authorities could not bring such a challenge by filing a petition for a writ of habeas corpus because he or she was "no longer in 'custody' for purposes of the writ." (Sen. Com. on Pub. Safety, Rep. on Assem. Bill No. 813 (2015-2016 Reg. Sess.) June 22, 2015, p. 6.) Similarly, although there is no custody requirement to bring a motion under section 1016.5 to withdraw a guilty plea for failure to be admonished of the possible immigration consequence of the plea, a section 1016.5 motion "is only available

where the *court* fails to give the general admonishment or the record is silent on the matter." (*Ibid.*) Finally, a person seeking to challenge a conviction based on the "unawareness of the immigration consequences" of his or her plea could not petition for "a writ of error coram nobis" because the challenge "amounted to a claim of ineffective assistance of counsel, which is not reviewable by way of writ of coram nobis." (*Id.* at p. 5.)

The rules governing a petition for writ of habeas corpus require a court to issue an order to show cause if the petitioner has made a prima facie showing of entitlement to relief, based on the petitioner's factual allegations taken as true, and, upon issuing the order, to appoint counsel for the petitioner who desires, but cannot afford, counsel. (Cal. Rules of Court, rule 4.551(c).) The same requirement to appoint counsel for an indigent petitioner who has made adequate factual allegations stating a prima facie case applies to a petition for writ of *coram nobis*. (*People v. Shipman*, *supra*, 62 Cal.2d at p. 232.) As for a motion to vacate based on the absence of immigration advisements by the court pursuant to section 1016.5, although the statute does not "specify the rules that apply to such a motion," the rules for writs of *coram nobis* have been held to apply to a section 1016.5 motion to vacate. (*People v. Totari* (2003) 111 Cal.App.4th 1202, 1206-1207 [although section 1016.5 does not expressly place burden on a defendant to prove reasonable diligence in seeking to withdraw a plea, court of appeal held the rules for writs of *coram nobis*, including the burden to prove reasonable diligence, also apply to a section 1016.5 motion to vacate "because a 'motion to vacate' has long been equated in California with a petition for a writ of *coram nobis*"].) We are not aware of any reason the rules for writs of

coram nobis applicable to a section 1016.5 motion would not include the constitutionally grounded rules for appointing counsel for an indigent moving party.

In light of the fact writs of habeas corpus and writs of *coram nobis*, and likely section 1016.5 motions to vacate, require court-appointed counsel for an indigent petitioner or moving party who has established a prima facie case for entitlement to relief, and given a section 1473.7 motion was intended to fill the gap left by the foregoing procedural avenues for relief,[5]

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[5] The report of the Senate Committee on Public Safety, when considering the bill that became amended section 1473.7, also refers to a motion to vacate under section 1473.6 when stating, "*Existing law* authorizes a person no longer unlawfully imprisoned or restrained to prosecute a motion to vacate the judgment based on newly discovered evidence, as specified, if the motion is brought within one year of the discovery." (Sen. Com. on Pub. Safety, Rep. on Assem. Bill No. 2867 (2017-2018 Reg. Sess.) June 4, 2018, p. 2.) Former and amended section 1473.7, at subdivision (a)(2), provide the moving party may challenge his or her conviction not just on the ground of prejudicial error impairing the moving party's ability to meaningfully understand the adverse immigration consequences of his or plea but also on the ground of newly discovered evidence of innocence. However, unlike section 1473.6, which requires the newly discovered evidence come within one of three specified categories, former and amended section 1473.7 do not require the newly discovered evidence of innocence fall within any specific category. (Compare § 1473.6, subd. (a), with § 1473.7, subd. (a)(2).) Thus, a section 1473.7 motion also fills the gap left by a section 1473.6 motion to vacate. Significantly, the procedure applicable to a motion to vacate under section 1473.6 is the same as for a petition for writ of habeas corpus, which requires appointment of counsel for an indigent petitioner who has established a prima

interpreting section 1473.7 to also provide for court-appointed counsel where an indigent moving party has adequately set forth factual allegations stating a prima facie case for entitlement to relief would best effectuate the legislative intent in enacting section 1473.7.

Moreover, both former and current versions of section 1473.7, subdivision (d), provide, "All motions shall be entitled to a hearing." Construing the amended statute to require appointment of counsel for an indigent moving party who has established a prima facie case for relief and who is in federal immigration custody would avoid the untenable result of having such a party, who cannot be personally present at a hearing, be effectively deprived of an opportunity to present his or her case and respond to any arguments made in opposition at the hearing on the motion.

3. *Reversal and Remand To Consider Bravo's Motion on the Merits Are Necessary*

Bravo contends the court's error in denying his motion to vacate his conviction without considering his request for appointment of counsel is reversible per se. Because Bravo's right to counsel in this proceeding is based on state statutory law, not constitutional law, that error, standing alone, is subject to California's constitutional harmless error doctrine. (See *In re Andrew S.* (1994) 27 Cal.App.4th 541, 549 [if right to counsel is statutory and not constitutional, the trial court's error is not reversible unless it is shown to be prejudicial].)

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facie case for entitlement to relief. (§ 1473.6, subd. (c); Cal. Rules of Court, rule 4.551(c).)

Nevertheless, under the circumstances here, the superior court's combined errors in failing to consider whether to appoint counsel for Bravo to prosecute the motion and denying the motion without a hearing and without addressing the merits have produced a meager record that precludes meaningful harmless error analysis. Accordingly, we reverse the order and remand for the superior court to consider whether Bravo has set forth adequate factual allegations stating a prima facie case for entitlement to relief under section 1473.7, to appoint counsel if appropriate and to address the section 1473.7 motion on its merits. (See *People v. Braxton* (2004) 34 Cal.4th 798, 818-820 [although trial court's error in refusing to hear new trial motion is not prejudicial per se, matter must be remanded for hearing on the motion if the appellate record does not allow the reviewing court to determine as a matter of law that the motion lacked merit or to decide the trial court would have properly exercised its discretion to deny the motion]; see also *People v. Anzalone* (2013) 56 Cal.4th 545, 553 [""under the California constitutional harmless-error provision some errors . . . are not susceptible to the 'ordinary' or 'generally applicable' harmless-error analysis—i.e., the *Watson* 'reasonably probable' standard—and may require reversal of the judgment notwithstanding the strength of the evidence contained in the record in a particular case"""].)

DISPOSITION

The order denying Bravo's section 1473.7 motion to vacate his conviction is reversed, and the matter remanded with directions to evaluate Bravo's request for appointment of counsel in a manner consistent with this opinion, to appoint counsel if appropriate and to consider the motion on its merits.

PERLUSS, P. J.

We concur:

ZELON, J.

FEUER, J.